Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
ALLIANCE CONTACT SERVICES, *et al.*	)	CG Docket No. 02-278
	)	DA No. 05-1346
Joint Petition for Declaratory Ruling That	)	
The FCC has Exclusive Regulatory Jurisdiction	)	
Over Interstate Telemarketing	)	

STATE OF INDIANA'S COMMENTS IN OPPOSITION TO ALLIANCE CONTACT SERVICES, *et al.'s* JOINT PETITION FOR DECLARATORY RULING

STEVE CARTER
Attorney General of Indiana
Thomas M. Fisher
Solicitor General

Office of the Attorney General of Indiana
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 232-6255
Telecopier: (317) 232-7979

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SUBMISSION OF COMMENTS

Subject to and without waiving either its motion to dismiss filed July 29, 2005, or its immunity from suit in this federal forum, the State of Indiana, by its Attorney General, respectfully submits these comments in opposition to Alliance Contact Services, *et al.'s* Joint Petition For Declaratory Ruling, filed April 29, 2005.

INTRODUCTORY STATEMENT

As outlined in Indiana's Comments In Opposition To The Consumer Bankers Association's Petition For Declaratory Ruling, CG Docket No. 02-278, No. DA 04-3835, Indiana has one of the most comprehensive and effective do-not-call laws in the nation. Ind. Code art. 24-4.7. Perhaps because of the overwhelming success of Indiana's law (and similar laws in other states), a group of telemarketers led by Alliance Contact Services (the "ACS Coalition") has petitioned the Commission to declare that only the FCC, and not the states, may impose consumer protection regulations on calls that cross state lines. The ACS Coalition is so frustrated by effective state consumer protection laws that it hyperbolizes frantically about a supposed state of "regulatory chaos" and "crisis" resulting from a "morass" of state laws applicable to interstate telemarketing.

What the ACS Coalition calls "regulatory chaos," however, the rest of America calls divided and limited government, or, more succinctly, federalism. Businesses in many sectors of the economy must abide by rules and regulations issued by multiple levels of government in multiple jurisdictions. Such "multi-variate" regulatory schemes have long existed not only with respect to business taxes, but also in the areas of (to name just a few) employment and labor laws, environmental regulations, charitable fundraising registration and, yes, consumer protection laws. Complying with each state's telemarketing laws is no more burdensome than complying with each state's differing regulations in any number of areas, and in fact the private sector is using computer technology to make full compliance with state and federal telemarketing laws cheap and efficient.

Contrary to petitioners' overwrought protests, federalism—which allows Indiana's citizens to insist on more privacy while permitting citizens of other states to settle for less—is working very well in terms of industry compliance and citizen satisfaction. There is no justification for the Commission to intercede and impose a minimum level of telephonic access to all American households. The states should be able to continue setting their own consumer protection rules unimpeded by the FCC, just has they have for decades.

SUMMARY OF ARGUMENT

The ACS Coalition's petition sets forth two basic arguments. First, it argues that the Federal Communications Act of 1934 forecloses enforcement of all state consumer protection laws against fraud and harassment committed by way of interstate telephone calls. The Commission, however, implicitly rejected this argument in its order creating the national do-not-call program when it acknowledged that states could regulate interstate calls in at least some ways without being preempted. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, 18 F.C.C. Rcd. 14014 ¶ 78 (2003) (hereinafter "Rep. and Order"). Common sense, common practice, and a straightforward reading of the Federal Communications Act of 1934 (both in its original state and as amended by the Telephone Consumer Protection Act of 1991) all confirm that states are not preempted from enforcing their consumer protection laws where their citizens are harassed or defrauded by telephone calls that cross state lines. The FCA largely allocated to the federal government the responsibility for regulating the provision of interstate telecommunications services, but it did not purport to interfere with the application of state consumer protection regulations to interstate telephone calls. Cases applying the FCA, including those cited by the ACS Coalition, support this view, as do comments from the Commission itself.

Furthermore, the text and history of the TCPA demonstrate that Congress did not contemplate preemption of any state telemarketing regulations regardless of whatever telemarketing rules the FCC might ultimately promulgate. The plain text of TCPA section 227(e)(1)(D) expressly states that the TCPA does not preempt state laws "which prohibit[] . . . the making of telephone solicitations," and Congress in fact *discarded* proposed TCPA language that would have expressly preempted state telephone privacy laws as applied to interstate calls. Perhaps equally as conclusive, the TCPA expressly speaks of what a state must do "*in its regulation of telephone solicitations*" after the Commission promulgates a do-not-call rule, requiring *only* that a state in that circumstance include the federal list (designed "for purposes of administering or enforcing State law," 47 U.S.C. § 227(c)(3)(J)) that relates to that state. 47 U.S.C. § 227(e)(2) (emphasis added). Also, the Do-Not-Call-Implementation Act of 2003, which requires an FCC report concerning the FCC's coordination with the states, implies that states will continue to enforce their own laws. Pub. L. No. 108-10, 117 Stat. 557 (2003). Even congressional debates concerning the Federal Trade Commission's do-not-call authority make it clear that Congress did not intend for stronger state laws to be preempted by either federal do-not-call program. Under these circumstances, the Commission cannot reasonably infer that states have no authority to enforce consumer protection laws against interstate telephone calls (or that it has the authority to declare such).

Second, the ACS Coalition argues that, if the FCA does not already preempt enforcement of state consumer protection laws against interstate telephone calls, the Commission itself should unilaterally declare such preemption. In a surprising, but refreshing, display of candor, the ACS Coalition makes no argument that any federal statute authorizes the Commission to preempt such laws on its own. Yet, rather alarmingly (and erroneously), the ACS Coalition takes the position that the Commission may nonetheless impose preemption without congressional authority to do so, as long as Congress has not specifically foreclosed such a rule. This argument turns long-accepted (and necessary) administrative and preemption law on its head. With due respect to the Commission, it is well settled that no federal agency may issue a rule unless Congress has granted it the authority to do so. Reasonable people may sometimes disagree whether Congress has granted that authority in a particular instance, but there should be no debate as to the need for congressional authority before an agency acts. Yet here the ACS Coalition is arguing that the Commission is limited not by whether Congress has delegated authority over policy, but only by whether Congress has reserved authority. The Commission should dismiss this argument.

Finally, declaring state do-not-call laws preempted as applied to interstate calls would be bad public policy. Our federalist structure permits states to provide their citizens with varying levels of privacy and other protection. This arrangement promotes and protects individual liberty, and it is a routine part of corporate life in America to comply with more than one type of business regulation. Computer technology makes compliance cheap and easy with respect to do-not-call regulations, and telemarketers have adjusted to multiple state and federal rules over the past several years. Over that same period citizens of states having comprehensive telephone privacy laws, such as Indiana, have come to expect that telemarketers simply will not bother them. Declaring that only the Commission may regulate telemarketing would impose the more relaxed federal scheme on all consumers for no good reason and would frustrate settled expectations of Indiana citizens. The Commission should side with individual liberty and privacy and permit Indiana to continue unfettered with its own highly successful telephone privacy experiment.

ARGUMENT

I. The Federal Communications Act Of 1934 Does Not Preempt State Consumer Protection Laws Regulating Interstate Telephone Calls

The ACS Coalition is not the first to assert that the FCA preempts state do-not-call laws as applied to interstate calls. When the FCC was initially considering the adoption of a do-not-call registry, businesses that engage in telemarketing made exactly this argument. (*See* In re Rules and Regulations Implementing Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking, comments of Intuit Inc. at 3 (Ct. Docket No. 02-278) (filed with the FCC May 5, 2003); WorldCom Reply Comments at 27 (Ct. Docket No. 02-278) (filed with the FCC Jan. 31, 2003)). However, there is no basis for concluding that the FCA preempts all state laws from applying to interstate telephone calls, and the Commission's order creating its do-not-call program implicitly rejects that notion.

A. The FCC Has Implicitly Rejected FCA Preemption of State Jurisdiction to Regulate Abusive Interstate Calls, and TCPA Legislative History Asserting Such Prior Preemption is Mistaken.

In its July 3, 2003 Report and Order creating its do-not-call registry program, the Commission observed that "[t]he record . . . indicates that states have historically enforced their own state statutes within, as well as across state lines." Rep. and Order at ¶ 78 (footnote omitted). The Report and Order also communicated in other ways the Commission's understanding that FCA does not preempt states from enforcing laws prohibiting abusive and fraudulent calls against interstate callers. *See id.* ("The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, and at least one federal court has found that the TCPA does not preempt state regulation of autodialers . . . ." (footnotes omitted)); *id*. at ¶

85 (noting that "long arm statutes" may be protected under section 227(f)(6) and that "nothing . . . in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court"). In fact, when discussing the possibility of preemption, the Commission focused entirely on the TCPA and not section 2 of the FCA as originally written. *See id*. at ¶¶ 78-85. The Commission's decision to leave preemption to a case-by-case analysis of whether a state's interstate telemarketing restrictions contravene the TCPA (*id*. at ¶ 84) itself implies that many such interstate regulations will not be preempted. This is an implicit rejection of the ACS Coalition's argument.

To be sure, when discussing the possibility of preemption, the Commission erroneously stated that "[w]e recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls." *Id.* at ¶ 83 (footnote omitted). The Commission cited only two cases for this proposition, *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986), and *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). Both of those cases, however, had only to do with laws regulating the provision of telephone service, not with laws regulating abusive telephone calls. Accordingly, it is not clear why the Commission, having recognized the obvious notion that states do not ignore interstate telephone predators of any stripe, later repaired to the fiction that, wherever the telephone is involved, all regulations must be viewed the same in terms of the division of state and federal power pursuant to the FCA.

This fundamental misunderstanding of the FCA, in turn, has misinformed the Commission's further acceptance, fundamental to the entire preemption issue, that "Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls" because of the "concern that states lack jurisdiction over interstate calls." Rep. and Order at ¶ 83 (footnote omitted). The Commission has proceeded based on that erroneous assumption only because the same notion appears in the legislative history of the TCPA and to some extent in the findings section of the TCPA itself. S. Rep. No. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970; *see also id.* at 5, 1973 ("Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who . . . place interstate telephone calls."); 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("State law does not, and cannot, regulate interstate calls."); TCPA, Pub. L. No. 102-243, 105 Stat. 2394 § 2(7) (finding that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation").

But, for the reasons discussed in more detail below, *see infra* at 13-19, these observations were incorrect when they were made and, because the TCPA itself nowhere expressly preempts state jurisdiction over abusive interstate telephone calls, are incorrect now. The TCPA's finding that "telemarketers can evade [state] prohibitions through interstate operations" is at best ambiguous and likely refers to enforcement difficulties rather than preemption difficulties. TCPA, Pub. L. No. 102-243 §2(7). But even if it mistakenly referred to preemption, that mischaracterization does not itself create preemption that did not otherwise exist. Ultimately, states *do* have jurisdiction to regulate abusive interstate calls—jurisdiction they have exercised continuously since 1934 without any serious claims of preemption.

B. The Text of the Telecommunications Act and Other Federal Laws Cannot Reasonably Be Understood to Support the ACS Coalition's Argument Concerning Preemption

The ACS Coalition's statutory preemption argument is based on a rather obvious misreading of Section 2 of the FCA. Section 2(a) of the FCA, they point out, provides that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication . . . ." 47 U.S.C. § 152(a). Taking this statement out of context, the ACS Coalition insists that it means to refer not only to the provision of interstate communication services and the facilities used to provide such services, but also to the behavior of the individuals participating in interstate calls, the words that they use, and the harm that they inflict with the communication. In context, however, Section 2(a) does not say what the ACS Coalition wishes it to say.

While Section 2(a) says that the provisions of the FCA apply to "all interstate . . . communication by wire," the term "communication by wire" is expressly defined to mean only "the *transmission* of writing, signs, signals, pictures, and sounds of all kinds by aid of wire . . . between the points of origin and reception of such transmission, including all *instrumentalities, facilities, apparatus, and services* (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153 (52) (emphasis added). Thus, the power to regulate an "interstate communication by wire" is only the power to regulate the means of interstate transmission, not the content of the communication, the conduct of the communicator, or the protection against injuries caused by harassing or fraudulent communications.

The further definition of "interstate communication" bears this out. The thrust of that definition focuses not on "communication" (which is addressed in various forms in definitions 33, 43, 50, and 52), but on the term "interstate," which means "from any State . . . to any other State . . . ." 47 U.S.C. § 153 (22). This definition, which is focused only on geography and nothing else, cannot reasonably be understood to alter or expand the meaning of "communication by wire" or any other variation of the term "communication" as used in the FCA.[1]

It is also highly significant for this discussion that the reservation of power over *intrastate* communications to the states in that same "interstate communication" definition is limited to circumstances where intrastate communications are "regulated by a State commission." *Id.* A "State commission" in turn is not just *any* state commission, but a state commission that "has regulatory jurisdiction with respect to intrastate operation of carriers." 47 U.S.C. § 153 (41). A carrier, of course, is a "common carrier for hire, in interstate . . . communication by wire . . . ." 47 U.S.C. § 153 (10). In other words, Congress was looking to make sure that those who provide the *service* of wire communication—and *not* those who merely communicate over wires—are regulated either by the FCC or a state commission.

C. The Rationale For the FCA is Not Frustrated by State Laws, Including Do-Not-Call Laws, that Apply to Interstate Calls

The limited reach of the FCA described above follows from the express goal of the FCA: to ensure efficient and reasonably priced wire communication services—*not* to protect consumers from all predators who happen to use telephones. *See* 47 U.S.C. § 151 (stating that the FCC was expressly created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .").

As explained in more detail in Indiana's Comments In Opposition To The Consumer Bankers Association's Petition For Declaratory Ruling, CG Docket No. 02-278, No. DA 04-

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[1] The separate definition for "foreign communication" confirms that Congress sought only to specify what was meant by the modifiers "interstate" and "foreign" and not to affect the meaning of "communication." *See* 47 U.S.C. § 153 (17) (defining "foreign communication").

3835, at 5-8, FCA preemption cases focus on the need to prevent state laws from interfering with the FCA's goal of providing rapid, efficient telecommunication services. State do-not-call laws in no way threaten interference with Congress' goal of providing a rapid, efficient, reasonably priced national telecommunications service, even when applied to interstate calls—they merely protect residential privacy from unwanted telemarketing calls. Such laws do not regulate the provision of telephone service, the physical facilities of telephone service, or the price of telephone service, but instead permit residential telephone subscribers to hang virtual "no solicitation" or "do not trespass" signs on their phones in order to preserve their peace, and accordingly are not subject to FCA preemption. *See Ind. Bell Tel. Co. v. Ward*, No. IP 02-170-C H/K, 2002 WL 32067296, at *7 (S.D. Ind. Dec. 6, 2002) ("Because resolution of the fraud claims before the court will not affect federal regulation of telecommunications carriers, plaintiffs' claims are not preempted by the FCA.").

To infer FCA preemption of state do-not-call laws would be like inferring that federal vehicle safety requirements preempt state negligent driving laws as applied to accidents caused by cars driven over state lines. Both types of laws address misuse of a lawful, otherwise-regulated instrument resulting in injury and cause no interference with the goals of the federal regulations. There is no basis for inferring preemption of either. *Cf. Ashley v. Southwestern Bell Tel. Co.*, 410 F. Supp. 1389, 1393 (W.D. Tex. 1976) ("Specifically, state tort law of invasion of privacy was not preempted by the federal scheme, and no attempt was made to impose uniformity in this area of state law."). Accordingly, the text of the FCA cannot reasonably be read to invest the FCC with exclusive jurisdiction over all misuse of telephones.

D. The ACS Coalition's FCA Preemption Cases and FCC Rulings Relate Only to the Regulation of Telephone Facilities and Service, Not to Laws Against Harassing, Unfair or Deceptive Interstate Calls

The case law and the FCC orders cited by the ACS Coalition show that the preemptive impact of the FCA with respect to "interstate communications" relates only to the regulation of interstate telephone common carriers and *facilities and service*, not service users or content. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) *(NARUC)* (ruling that "purely intrastate *facilities and services* used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use") (emphasis added); *N.C. Utils. Comm'n v. FCC*, 537 F.2d 787, 793 (4th Cir. 1976) (*NCUC*) (concerning the FCC's "jurisdiction over the rendition of interstate and foreign communication *services*" and ruling that the FCC regulates "the interconnection of [certain] customer provided equipment" (emphasis added); *State Corp. Comm'n of Kan. v. FCC*, 787 F.2d 1421, 1423 (10th Cir. 1986) (holding the FCC had plenary authority to regulate allocation of equipment costs used in both interstate and intrastate service); *AT&T Communications v. Pub. Serv. Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) (local disconnect service deemed a billing and collection service covered by an FCC order limiting such charges); *Operator Serv. Providers of Amer. Pet. for Expedited Declar. Ruling*, Mem. Op. and Order, 6 F.C.C. Rcd. 4475 ¶ 12, 21 (1991) ("*OSPA*") (FCC's duty under the Act to "assure the reasonableness of the rates, terms, and conditions, of interstate communications *services*" precludes application of state statute to interstate operator services); *Amer. Tel. & Tel. Co. & the Assoc. Bell Sys. Co. Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exch. (FX) Serv. & Common Control Switching Arrangements (CCSA)*, Mem. Op. and Order, 56 F.C.C. 2d 14 ¶ 24 (1975) (affirming the Commission's authority over the interconnection of interstate transmission *facilities*).

Moreover, given the limited meaning of "communication by wire" as used in section 2(b) of the FCA (*i.e.* to mean the physical transmission of data, *see* 47 U.S.C. § 153 (52)), when the Commission and the courts refer to the Commission's plenary and exclusive jurisdiction over interstate communications, they must *necessarily* be referring only to jurisdiction over common carriers and the services and facilities of interstate communication.

The ACS Coalition makes much of the Commission's OSPA Decision, touting it as an application of FCA section 2 "to very similar factual circumstances." (ACS Pet. at 36) But as the ACS Coalition itself recognizes, the OSPA Decision merely addressed one dimension of interstate wire communications *service*—in particular, operator assistance service. *OSPA*, 6 F.C.C. Rcd. 4475 at ¶ 10. As the Telephone Operator Consumer Services Improvement Act makes clear, operator assistance is a "telecommunications service . . . that includes . . . assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call . . . ." 47 U.S.C. § 226(a)(7). Thus, as part of the process of *transmission* of interstate wire communication, operator services fits neatly within the definition of "communication by wire" in 47 U.S.C. § 153 (52).

Furthermore, in the OSPA Decision the Commission characterized the reach of its exclusive authority consistent with Indiana's "services and facilities" theory: "The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority [footnote omitted], Congress having deprived the states of authority to regulate *the rates or other terms and conditions under which interstate communications service may be offered* in a state [footnote omitted]." *OSPA,* 6 F.C.C. Rcd. 4475 at ¶ 10 (emphasis added); *see also id.* at ¶ 11. And the OSPA Decision leaves no uncertainty as to the relationship between operator services and the Commission's core concern with the provision of interstate communications service: "The Tennessee statute . . . seeks to exercise one of the fundamental functions exclusively assigned to this Commission under the Communications Act, namely to assure the reasonableness of the rates, terms, and conditions of interstate communications services." *Id.* at ¶ 12; *see also id.* at ¶¶ 12 n.23, 14, 16.

By contrast, under no reasonable understanding can state do-not-call laws and the like be characterized as regulations of the rates, terms, and conditions of interstate communications services. They are regulations of those *using* the services, not of those *providing* the services.[2] Accordingly, there is no basis for inferring FCA preemption.

II. The TCPA Authorizes the FCC's Do-Not-Call Program, But it Does Not Preempt or Authorize Preemption of State Do-Not-Call Laws

A. The Commission Has Recognized That Its Authority Over Telemarketing Derives From the TCPA, Not From the FCA as Originally Enacted

Again, with respect to interstate wire communications, sections 1 and 2 of the FCA only authorize FCC jurisdiction the provision of services and facilities for such communication, and not over content or the abuse, harassment and fraud committed against call recipients. One implication of this position is that, prior to the amendments contained in the Telephone Consumer Protection Act of 1991, the Commission had no authority to promulgate a national do-not-call program. And, indeed, the Commission, it its July 3, 2003 Report and Order creating the federal do-not-call program, traced its authority directly to the TCPA (and the Do-Not-Call

[2] At least not as such. Indiana's do-not-call law, of course, applies to telecommunications providers to the extent they use telephone service to conduct sales calls, but it does not regulate them in their capacities *as providers*. *See Sprint Corp. v. Evans*, 818 F. Supp. 1447, 1458 (M.D. Ala. 1993) (observing that, even if a state may not increase a common carrier's regulatory burden by requiring it to report the interstate obscene calls of its customers, the state could prosecute the common carrier if the carrier itself was the source of the interstate obscene calls because then "the common carrier would be acting as the information provider rather than solely as a common carrier").

Implementation Act of 2003), and not to the FCA as it existed prior to the TCPA. Rep. and Order at ¶¶ 16, 28.

As the Commission's July 3, 2003, Rep. and Order acknowledges, the TCPA authorized the Commission to undertake a rulemaking proceeding "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227 (c)(1); *see* Rep. and Order at ¶ 16. The Commission promulgated rules requiring, among other things, firms to keep in-house lists for individuals that asked not to be called, but it did not create a national do-not-call registry program at that point. *Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, CC Docket No. 92-90, Rep. and Order, 7 F.C.C. Rcd. 8752 (1992); *see* Rep. and Order at ¶ 6. Then, in 2002, after Indiana and other states had begun enforcing their own do-not-call laws against interstate calls with great effect, and after the FTC had begun promulgating its own do-not-call program, the Commission issued a notice of proposed rulemaking seeking comment on, among other things, whether the Commission should establish a national do-not-call list. *Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278 and CC Docket No. 92-90, Notice of Proposed Rulemaking and Mem. Op. and Order, 17 F.C.C. Rcd. 17459, (2002); *see* Rep. and Order at ¶ 14. In 2003 Congress passed the DNCIA and specifically instructed the FCC to conclude its ongoing TCPA rulemaking proceeding within 180 days, which it accomplished by way of its July 3, 2003, Report and Order establishing its do-not-call registry program. *See also* 15 U.S.C. §6101; Rep. and Order at ¶ 15.

In that July 3, 2003, report and order the Commission relied not on section 1 or 2 of the original FCA, but on the TCPA amendments, and specifically 47 U.S.C. § 227(c). Rep. and Order at ¶ 16. Thus, the Commission has plainly understood that its authority in this area derives not from its long-standing general authority over interstate telecommunication services and facilities by way of section 1 or 2 of the FCA, but from the TCPA's much more specific authorization for the FCC to govern a particular type of content—telemarketing content.[3] With respect to the preemption issue, the only remaining question is whether the TCPA amendments to the FCA vested the FCC with *exclusive* authority over interstate telemarketing. The answer is no.

B. The Text and History of the TCPA Preclude Preemption

The language of the TCPA itself shows that there was no "clear and manifest" purpose to preempt state laws. Not only is there no explicit language in the TCPA stating that it preempts any state law in the field of telephone solicitations, the TCPA expressly does not preempt "any state law . . . which prohibits . . . the making of telephone solicitations." 47 U.S.C. § 227(e)(1)(D). In full this statute provides as follows:

> (e) Effect on State law
>
> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, **nothing in this section or in the regulations prescribed under this section shall preempt any State law** that imposes more restrictive intrastate requirements or regulations on, ***or*** **which prohibits**--
>
> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> **(B)** the use of automatic telephone dialing systems;
>
> **(C)** the use of artificial or prerecorded voice messages; or
>
> **(D) the making of telephone solicitations**.

47 U.S.C. § 227 (e) (emphasis added).

[3] Thus, it is incorrect for the ACS Coalition to say that the significance of the TCPA was merely to grant the Commission more jurisdiction over *intrastate* calls (*see* ACS Pet. at 34); without section 227 (c)'s authorization for the Commission to address telemarketing, that extended jurisdiction would have been meaningless for these purposes.

Thus, section 227(e) expressly prohibits preemption of *any* state law that *prohibits* telemarketing calls (even as applied to interstate calls), even though it also expressly prohibits preemption of only *intrastate* applications of state laws that merely *regulate* telemarketing calls. This is not likely an accident or an anomaly. There is a fundamental difference between laws designed to prevent the telephone from ringing altogether (the prohibition laws) and those that merely regulate the means by which one may cause a telephone to ring (e.g., automatic dial and announce device laws) or the message conveyed to a consumer after the telephone has rung and been answered (e.g. prerecorded message laws or mandatory disclosure laws). The reason is twofold. First, state do-not-call laws, because they stop the telephone from ringing altogether, provide far more privacy protection and are therefore far more important to consumers. Second, if preempted as to interstate calls, do-not-call laws provide greater incentives for telemarketers to evade state restrictions by crossing state lines. Common sense tells us that a telemarketer is far more likely to move operations to another state if it means keeping an entire market of registered telephone subscribers open than if it merely means making fewer disclosures during a telemarketing call.

Courts have already understood this provision to expressly disclaim preemption of *all* state laws "which prohibit[] . . . the making of telephone solicitations." 47 U.S.C. § 227(e)(1)(D). In *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997), for example, the court rejected, based on § 227(e), the theory that TCPA preemption could support the inference that federal courts have concurrent jurisdiction over private actions under the TCPA:

> In any event, International Science's preemption argument must be rejected at its beginning because Congress stated that state law is not preempted by the TCPA. *See* 47 U.S.C. § 227(e) ('nothing in this section . . . shall preempt any State law

> that imposes more restrictive intrastate requirements . . . *or* which prohibits' certain enumerated practices (emphasis added)).

Id. at 1153. It is particularly significant that the Fourth Circuit added the emphasis to the word "or" in the statute, underscoring that it understood that disjunction to mean something, *i.e.* that "intrastate" does not modify "prohibits." This reading of the statute enabled to court to arrive at the broad conclusion that "state law is not preempted by the TCPA." *See id. see also Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *opinion modified on reh'g*, 140 F.3d 898 (11th Cir. 1998) (relying on *International Science*).

Similarly, in *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the court held that the TCPA did not preempt a Minnesota statute regulating the use of automatic telephone dialing-announcing devices, even though that statute "is 'virtually identical' to the TCPA." *Id.* at 1548 (citing *Lysaght v. New Jersey*, 837 F. Supp. 646, 648 (D.N.J. 1993)). The court could not, from the language and structure of the TCPA, infer any congressional intent for the TCPA to preempt state law, observing that with section 227(e), "the [TCPA] includes a preemption provision expressly *not* preempting certain state laws." *Van Bergen*, 59 F.3d at 1548; (emphasis added); *see also State v. Minimum Rate Pricing, Inc.*, No. C1-97-008435, 1998 WL 428810, at *4 (Minn. Dist. Ct. Apr. 13, 1998) ("TCPA does not preempt state laws which may be more restrictive to telemarketers than is the federal law.").

The Commission itself has acknowledged the validity of reading the TCPA to disclaim preemption of any state laws prohibiting telephone solicitations. *See* Rules and Reg. Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278; 68 Fed. Reg. 44144, 44155 ¶ 60 (2003). And this reading is supported by the fact that earlier, unenacted versions of the TCPA contained a provision specifically preempting "any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section." 137 Cong. Rec. S16201 (daily ed. Nov. 7, 1991). Congress deleted this express preemption provision from the final version of the TCPA. Such a pre-enactment deletion "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); *accord, Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'" (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 443 (1987))).

Moreover, another provision of the TCPA expressly acknowledges that states will continue to "regulat[e] . . . telephone solicitations," even once a federal do-not-call system was established:

> If . . . the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, *in its regulation of telephone solicitations*, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. § 227(e)(2) (emphasis added). This provision makes clear that Congress contemplated three critical points with respect to the regulatory scheme for telephone solicitations: *first*, that states have regulated and would continue to regulate telephone solicitations; *second*, that in regulating telephone solicitations, states would use a telephone subscriber database or list system; and *third*, that the *only* requirement of states in furtherance of such continued regulations is that their lists must include (but need not be limited to) the national database as to that state.

It is as well established in this context as in any other that the imposition of express statutory requirements supports the inference that Congress intended no others. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implied that matters beyond that reach are not pre-empted."). Here, the TCPA requires state lists to include the national database as to that state, but it goes no further. It leaves unaffected all other dimensions of state do-not-call regulations, as Congress confirmed when it required that any FCC database "*shall* . . . be designed to enable States to use the [Commission's database] . . . *for purposes of administering* or *enforcing State law*." 47 U.S.C. § 227 (c)(3)(J) (emphasis added). It would thus contradict the TCPA's express language and amount to an unreasonable reading of the TCPA to infer that Congress intended to preempt, or provided the authority for the Commission to preempt, the interstate application of state do-not-call laws.

C. Other Federal Laws and Legislative History Demonstrate That Congress Intended Not to Preempt Any Applications of State Do-Not-Call Laws

The TCPA is not the only source for guidance concerning Congress' national telephone privacy policy. The Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat 557 (2003) ("DNCIA"), which became effective March 11, 2003, confirms both that the TCPA does not preempt state telephone privacy laws and that the FCC is not empowered to preempt those laws. The DNCIA specifically requires the FCC, once it promulgates its own do-not-call rules, to provide Congress with "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call registry' with similar registries established and maintained by the various States." *Id*. at §4(b)(4). If the TCPA preempted state registries or do-not-call laws, or if the FCC was intended to preempt those laws and registries, there would have been no reason for Congress to enact a law requiring an analysis of state registry enforcement *after* the FCC's own rule was in force.

Next, the Congressional debates concerning the FTC's authority to establish a do-not-call list shed yet more light on the limits of the overall national do-not-call policy. Two days after a federal district court determined that Congress had not delegated authority to the FTC to establish a national do-not-call list (*see U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003)), both the House and Senate voted to validate the FTC's exercise of that authority. *See* An Act To Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82, 2003 H.R. 3161 (enacted). The debate over that enactment provided Members of Congress the opportunity to express their understanding of the proper interplay between the state and federal do-not-call programs generally. Indiana Representative Steve Buyer stated as follows on the Congressional Record:

> It is my understanding that Congress has no intention of preempting State laws that provide protections greater than those provided by our Federal 'do not call' program. Furthermore, I also understand that Congress has no intention of permitting the *FCC* or FTC to preempt, by regulation or otherwise, State statutes that provide greater protections than the Federal 'Do Not Call' program provides.

149 Cong. Rec. H8918 (daily ed. Sept. 25, 2003) (statement of Rep. Buyer) (emphasis added). Furthermore, he said Congress "does not intend to interfere with statutes, like Indiana's, that choose to tighten" loopholes in the federal program. *Id.* "[E]fforts like Indiana's that inspired the federal 'do not call' program, demonstrate the critical role that states can play in achieving creative solutions to serious problems. Such efforts should not be discouraged." *Id.*

III. The Existence of the FTC's Do-Not-Call Program Refutes the ACS Coalition's Exclusive Jurisdiction Theory

One area where the ACS Coalition decries the federalist approach to telemarketing consumer protection laws is in connection with laws that apply to nonprofits. (ACS Pet. 17, describing nonprofit organizations as "particularly hard hit"). The ACS Coalition then claims that "[u]nder the Commission's rules, all calls made by or on behalf of tax-exempt non-profit organizations are exempt from the do-not-call rules." (*Id.*) This claim is incorrect and misunderstands the overall structure of the federal do-not-call rules program. Indeed, the very fact that Congress has divided the federal program between the FCC and the FTC undermines any argument that do-not-call rules are part of the fundamental and exclusive power of the FCC.

The TCPA, which is the only source of law delegating to the FCC its authority to regulate "telephone solicitations," expressly defines the term "telephone solicitation" to "not include a call or message . . . by a tax exempt nonprofit organization." 47 U.S.C. § 227(a)(4)(c) (2005). The FCC, therefore, has no authority to regulate charities or to preempt states in their regulation of charities. *See also* Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, 68 Fed. Reg. 44148 ¶ 23 (2003) ("We note that 47 U.S.C. 227(a)(3) (2003) specifically excludes calls made by tax-exempt nonprofit organizations from the definition of telephone solicitation."). Thus, it is incorrect to say that non-profits are exempt under the Commission's do-not-call rule. It is instead the case that the Commission has no jurisdiction to regulate telephone solicitations by nonprofits. But that does not mean that the telephone solicitations of nonprofits go unregulated at the federal level.

While Congress did not bestow the FCC with regulatory authority over charities with respect to telephone solicitations, it did delegate that authority to the Federal Trade Commission. In 1994, the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") was signed into law and required the FTC to issue a Telemarketing Sales Rule prohibiting deceptive or abusive telemarketing acts or practices. 15 U.S.C. §§ 6101-08. The Telemarketing Act expressly provides the FTC with authority over charities' telemarketing efforts. 15 U.S.C. § 6102(a)(2). More recently, the USA PATRIOT Act of 2001 armed the FTC with the power to address charity telephone solicitation fraud. USA PATRIOT Act, Pub. Law No. 107-56, § 1011 (codified at 15 U.S.C. ¶¶ 6102(a)(2), (3)(D), 6106(4) (2001)). Pursuant to this authority, the FTC established a national do-not-call rule with respect to certain industries. *See Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (codified at 16 C.F.R. pt. 310) (Jan. 29, 2003).

The FTC rule, to be sure, does not completely bar non-profits from calling registered telephone subscribers. Instead, it merely requires non-profits and their professional solicitors to keep and observe their own in-house do-not-call lists. 16 C.F.R. § 310.4 (b)(1)(iii)(A) (2003). More important for present purposes, however, the FTC expressly did *not* preempt states' telephone privacy laws that apply to charities. *See FTC Order on Telemarketing Sales Rule, Final Rule*, 68 Fed. Reg. 4580, 4638 n.696 ("[FTC] does not intend the Rule provisions establishing a national do-not-call registry to preempt state do-not-call laws."); *id.* at 4665 ("While many industry representatives argued that the way to achieve the necessary level of coordination between the state and federal lists was for the Commission to preempt inconsistent state regulations, the Commission has declined to do so at this time.").

This overall federal regulatory structure is significant for several reasons. First, it reinforces the point that the Commission's authority to regulate telemarketing does not arise from its plenary section 2 authority over interstate wire communications. It instead was delegated by Congress under the TCPA, and is now codified solely at 47 U.S.C. § 227. Second, the simple fact that Congress has divided federal power over telemarketing between two agencies underscores the notion that telemarketing regulation is not akin to regulating the common carriers, services and facilities of interstate wire communication. It is not the case, for example, that the FCC has jurisdiction over telecommunications service to for-profit corporations, but the FTC has jurisdiction over the same service to non-profits. Among federal agencies, the FCC plainly has exclusive authority in that regard. But telemarketing is different. Congress delegated regulation of the telemarketing of certain industries to the FTC because doing so is compatible with the jurisdiction the FTC otherwise has over those industries. *See Telemarketing Sales Rule,* Notice of Proposed Rulemaking, 67 Fed. Rec. at 4497, n.54 ("Telemarketing Act and the [Telemarketing Sales Rule] do not apply to activities excluded from the FTC's reach by the FTC Act").

Third, this distribution of power at the federal level is significant because of how it would affect the impact of any decision by this Commission to preempt states' do-not-call laws as applied to interstate telephone calls. Specifically, such preemption would not apply to calls by or on behalf of non-profits since the Commission has expressly been deprived of jurisdiction over calls. 47 U.S.C. § 227(a)(4)(C) (2005). The FTC has jurisdiction over telemarketing by non-profits, and it has expressly announced that states are *not* preempted from imposing their own do-not-call laws on non-profits, and it draws no distinction between interstate and intrastate calls.

IV. The FCC May Not Impose Preemption Without Congressional Authority

It is surely axiomatic that the FCC may preempt state law only where Congress has provided the authority for it to do so, but the ACS Coalition seems not to accept that proposition. Instead, the ACS Coalition seems to believe that the FCC can do whatever it wants, so long as Congress has not prohibited it from doing so, stating "[n]othing in section 227 prevents the Commission from exercising [its] power here." (ACS Pet. at 43) Astoundingly, the ACS Coalition also says that the states are wrong to insist that the Commission may not preempt unless Congress has given it the authority to do so, and goes on to imply that in other contexts the Commission has preempted state law without having been given the authority to do so.[4] (*Id.*) Accordingly, it is necessary to revisit some basic preemption principles.

"[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Agency preemption must be a "reasonable accommodation of conflicting policies *that were committed to the agency's care* by the statute. . . ." *United States v. Shimer,* 367 U.S. 374, 383 (1961) (emphasis added); *see also Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

States enjoy a "presumption" that "the historic police powers of the States [a]re not to be superseded by [a] [f]ederal [a]ct unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord, Hillsborough Co., Fla. v. Automated Med. Labs. Inc.,* 471 U.S. 707, 714 (1985). In all preemption cases, particularly those in which Congress has "legislated . . . in a field which the States have traditionally occupied," courts start with the assumption that the federal act does not supersede the historic police powers of the states unless that was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230). "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (internal citation omitted). As underscored by several state attorneys general at the do-not-call rulemaking stage, consumer protection is an area within the states' traditional police powers that may be superseded only upon the clearest

[4] The *Vonage Order* that the ACS Coalition cites in this regard, like all the other cases and rules it cites, relates only to preemption of state laws that regulate the provision of communications services. *Vonage Holdings Corp. Pet. for Declaratory Ruling*, Mem. Op. and Order, 19 F.C.C. Rcd. 22,404 (2004) (FCC preempted Order of Minnesota Commission concerning Vonage's DigitalVoice VoIP Service).

showing of congressional intent to do so. (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments and Recommendations of the Attorneys General, at 8-10 (CG Docket No. 02-278) (filed with the FCC Dec. 9, 2002)).

As recounted in Parts I and II, *supra*, and as discussed on more detail in Indiana's Comments In Opposition To The Consumer Bankers Association's Petition For Declaratory Ruling (CG Docket No. 02-278), neither the FCA as originally written nor the TCPA has conferred any power on the Commission to preempt state laws regulating interstate telemarketing. The Commission therefore may not preempt the states even if it concludes that such preemption would be good policy. In any event, preemption in this context would be bad policy.

V. Preemption Would Leave Consumers Exposed To Interstate Telephone Scams and Frustrate the Settled Privacy Expectations of Indiana Citizens

A. Inferring FCA Preemption Would Leave Vulnerable Consumers Exposed

As the comments of 48 other States make exceedingly clear, state attorneys general have a long, unchallenged history of enforcing state consumer protection laws where the violation occurs by way of an interstate telephone call. (Comments of the Attorneys General in opposition to Alliance Contract Services, *et al.* Joint Petition (CG Docket 02-278)). In such circumstances state attorneys general have enforced state laws prohibiting deceptive trade practices, fraud, and harassment. *Id.* In light of the limits of the FCA, as well as the Commission's limited resources and focus, this well-developed consumer protection role for the attorneys general makes sense. The Commission was charged with developing, and has developed, expertise for regulating the market for telecommunications, including the provision of services and facilities for telecommunications. It has not been charged with responsibility for prosecuting consumer injury cases just because the injury is occasioned by an interstate telephone call.

Yet if the Commission were to adopt the ACS Coalition's view of the FCA's preemptive force, that is precisely where the Commission would find itself—with the responsibility for safeguarding consumers from *all* injuries that can occur by way of an interstate telephone call. That is because, in the ACS Coalition's view, the Commission's power to regulate "interstate communication by wire" includes the *exclusive* authority to regulate what is said in those communications. And if that is the case, that power applies just as much to fraudulent telemarketing as it does to simply unwanted telemarketing. It applies as much to obscenity as to commercial pitches. And states would be prohibited from enforcing their own laws against any of it where the calls cross state lines. That would mean the scores of matters cited by the other states, plus untold others, could not again be brought. The result would be a gaping whole in consumer protection enforcement; the poor and the elderly (among others) would have little recourse when they fall prey to unscrupulous interstate telemarketers.

The ACS Petition urges that this would not be the result because of the TCPA's allowance for states to enforce their own general civil and criminal laws. *See* 47 U.S.C. § 227(f)(6). But here the ACS Coalition steps on its own logic and reveals the extent to which it does not grasp the implications of its theory. The ACS Coalition's theory is that section 2 of the FCA of 1934, *not* the amendments brought under the TCPA, preempts states from regulating interstate telephone calls *at all*. If that is so, then states cannot enforce their "general civil and criminal" laws against interstate telemarketing unless the TCPA grants that authority or at least carves such laws out of the set of laws covered by section 2 of the FCA. The ACS Coalition points to no such authority in the TCPA, and section 227(f)(6) says only that "[n]othing contained in this *subsection* shall be construed to prohibit" state proceedings based on the state's general civil and criminal laws. 47 U.S.C. § 227(f)(6) (emphasis added). Section 2 of the FCA is plainly not a part of subsection 227(f), nor is it any subsection of section 227. Thus, under the ACS Coalition's theory, even enforcement of "general" civil and criminal laws against interstate telephone calls would still be prohibited.[5]

It is also a feeble response to say state attorneys general could still enforce state consumer protection laws—including do-not-call laws—against *intra*state calls. Once telephonic predators know that states have no power over interstate calls, why would they make any other types of calls? Even Indiana businesses that want to reach Indiana customers would make interstate calls since all they would have to do is set up a call center in another state, or even simply hire a telemarketing firm in another state. They would have to be economically illiterate not to do so. State lines are essentially meaningless here. Unless the Commission is prepared to adopt and undertake enforcement of a comprehensive federal consumer protection plan, it should dismiss the ACS Coalition's all-encompassing, ill-considered FCA preemption theory.

[5] Section 227(f)(6) is merely designed to prevent courts from misconstruing subsections 227(f)(2) and (3) to prevent state officials from proceeding on state charges in state court where they could also have chosen to bring a TCPA claim in federal court. The reason for the term "general" in the statute is unclear, but it cannot reasonably be understood to imply that Congress was foreclosing states from enforcing an otherwise-undefined subcategory of "special" state laws. For purposes of exclusive FCC jurisdiction and section 227(f)(6), there is no principled distinction underlying the ACS Coalition's characterization of do-not-call laws as "special" and anti-fraud laws as "general." (*See* ACS Pet. at 29) What jurisdictional difference can possibly separate fraudulent sales pitches from honest ones? Indeed, the ACS Coalition's theory in this regard is so highly formalistic that it would permit states to enforce fraud statutes against interstate telephone calls so long as the statute did not mention telemarketing, but would preempt interstate enforcement of a fraud statute directed specifically at telemarketing. On the other hand, if for some unknown reason the ACS Coalition's logic holds water, Indiana's do-not-call statute falls within section 227(f)(6)'s safe harbor for "general" laws because violators are deemed have committed a deceptive act. Ind. Code § 24-4.7-5-1, which of course is generally forbidden in Indiana for all forms of sales, not just telephone sales. Ind. Code art. 24-5.

B. Preempting Interstate Application of States' Do-Not-Call Laws Would Frustrate the Settled Expectations of Millions of Consumers

As explained in more detail in Indiana's Comments In Opposition To The Consumer Bankers Association's Petition For Declaratory Ruling at p. 24 (CG Docket No. 02-278), Indiana citizens have uniquely become accustomed to the high level of success of the Indiana do-not-call law. For the past three years, registered Indiana telephone subscribers have experienced a dramatic decrease in unwanted telemarketing calls. A 2002 survey showed that nearly 98% of Indiana's registered telephone subscribers reported receiving "much less" (86.6%) or "less" (11.2%) telephone solicitations as a result of the Indiana law, with the average number of calls dropping by 10.2 per week for each registered number. *Id.* at Exhibit A at Table 1, 2. Because of the Indiana law's extraordinary success, over 1.6 million Indiana registered telephone subscribers, representing approximately 3.65 million Indiana citizens, or over 59% of the state's entire population,[6] have taken advantage of the Indiana Act's protections. Ind. Util. Regulatory Comm'n 2004 Tel. Report to the Regulatory Flexibility Com. Of the Ind. Gen. Assembly (2004) ("Tel. Rep.").

Particularly because they have grown accustomed to the effectiveness of Indiana's law over the past three years, Indiana citizens would (understandably) be frustrated and resentful if their privacy were to be cut back by federal preemption. Indiana's registered telephone subscribers have come to associate the concept of telephone privacy with a successful state government program that has cut back dramatically on the disruptions they suffer at home. While preemption may not matter as much in other states that already have do-not-call laws with EBR (and personal relationship) exemptions, Indiana citizens will almost certainly notice the difference in dramatic fashion. According to Indiana's 2002 survey, it would take less than 1.5

[6] Based on 2003 U.S. Census Bureau Population Estimates.

calls per registered line per day for Indiana's citizens to suffer just as much residential disruption as they did before their state law went into effect in 2002. And the nature of residential privacy is such that any upward adjustment in unwanted telemarketing calls that citizens receive—however slight—will be highly noticeable and highly resented.

Thus, while the FCC's telephone privacy program may provide a net privacy benefit for the rest of the nation, in Indiana it can only hurt. Preemption of Indiana's well-established telephone privacy program would thus defeat the cause of liberty and individual privacy in a fundamentally unfair way by undoing the reasonable and settled expectations of Indiana's citizens. Worst of all, it would grant an unjustified and nearly unfettered license to intrude upon the private dwellings of those who have unequivocally expressed a desire to be left alone. Particularly in Indiana, do-not-call preemption is bad policy. The Commission should forbear and permit Indiana's bold experiment to continue.

In this regard it is important to note again the fundamental difference between rules that *prohibit* calls to registered telephone subscribers and rules that merely *regulate* calls to registered telephone subscribers. This difference is significant not only for purposes of understanding 47 U.S.C. § 227(e) (1), (*see* Part II.B., *supra*), but also for understanding the settled expectations of Indiana consumers. What matters are the settled expectations of registered Indiana telephone subscribers that telemarketers will not cause their telephones to ring—an expectation that would be frustrated by federal preemption. It matters far less whether telemarketers must abide by state law concerning automatic dialers, pre-recorded messages, foreign call centers, connection to telemarketing clients, or required disclosures. For consumers, the differences between federal and state regulations of those types are relatively minor compared with differences concerning who may call consumers *at all*. And Indiana may be unique in this regard. Indiana has a far more comprehensive ban on unwanted telemarketing calls than any other state, and its citizens have benefited from that law for over three years in ways the citizens of other states have not. Indiana citizens who are accustomed to peace and quiet by virtue of the Indiana law should continue to enjoy it.

C. Multi-jurisdictional Regulation Is Routine, Not "Chaos," and Compliance with Multiple Do-Not-Calls is Cheap and Efficient

1. Multi-jurisdictional regulation is a legitimate, long-accepted fact of life for national businesses operating under our federalist structure

The ACS Coalition's petition includes an exhaustive accounting of the telemarketing rules its members must live by when contacting consumers in the United States, and it even collects some legislative proposals. From the mere existence of these various rules—and no empirical data or other evidence—the ACS Coalition then posits that this circumstance represents "chaos" and a "crisis." But multi-jurisdictional regulation has long been the norm in many national industries and does not on its own suggest something has gone awry with a given regulatory structure. Federalism is not a "crisis" that needs to be fixed; it is a well-tested structural safeguard for the citizens of each state against risks associated with the over-centralization of power.

To take but a few examples, sweepstakes promoters must follow the various laws of numerous states that govern disclosure, winners' lists, pre-contest filings and even the use of certain words, among other things. *See* Julie S. James, *Regulating the Sweepstakes Industry: Are Consumers Close to Winning?*, 41 Santa Clara L. Rev. 581, 595-96 (2001). The franchising of businesses nationwide is governed by federal law and a patchwork of state laws regarding franchising and business opportunities. *See* Disclosure Requirements & Prohibitions Concerning Franchising & Business Opportunity Ventures, 16 C.F.R. 436; Mitchell J. Kassoff, *Complex of*

Federal and State Laws Regulates Franchise Operations as Their Popularity Grows, N.Y. St. B. A. J., Feb. 2001, at 48 (*available at* http://www.lawyerment.com.my/library/publ/ biz/review/d_6.shtml). Businesses that operate health facilities, such as nursing facilities, on a nationwide basis must adhere to diverse state regulations governing nursing facility operations and the licensure requirements for the administrators who manage the facilities. *See, e.g.,* Center for Health Workforce Studies, *A Legal Practice Environment Index for Nursing Home Administrators in the Fifty States* (2004). Mail-order pharmacies operating across state lines must also adhere to each state's registration or licensure requirements. *Compare* N.H. Rev. Stat. Ann. §318:37 *with* Ind. Code Ch. 25-26-18. In the course of doing business, mortgage lenders and brokers must follow assorted state disclosure requirements for advertisements and fees. *See* Therese G. Franzen, *Doing Mortgage Business on the Web –Same Rules, Different Venue*, 55 Consumer Fin. Q. Rep. 245, 246 (2001).

This highly abbreviated listing of a few areas where national businesses are subject to multiple types of state and federal regulations (think also about all the state and federal tax laws and state and federal employment and labor laws that national businesses—including the very businesses involved in this petition—must contend with) demonstrates what should be obvious: there is nothing inherently chaotic or illegitimate about an environment where businesses must comply with different types of state and federal laws covering the same general subject matter. Indeed, the ACS Coalition argues (erroneously) that, even under its broad FCA preemption theory, states would still be allowed to "redress[] violations of state statutes of general applicability" (ACS Pet. at ii), but it never explains why being simultaneously subject to differing state and federal laws somehow deemed to be "general" is any less "chaotic" than being subject to multiple state and federal do-not-call laws. The answer is that there is no difference. Each type of multi-jurisdictional regulation is equally legitimate and manageable.

2. Using computer technology, the market has made compliance with multiple telemarketing laws cheap and efficient

As explained in more detail in Indiana's Supplemental Comments In Opposition To The Consumer Bankers Association's Petition For Declaratory Ruling CG Docket No. 02-278, telemarketers have cheap and efficient resources available to enable compliance with each state's (and the federal government's) telemarketing laws. For example, the TeleBlock® service of New York-based Call Compliance, Inc. and XO Communications, Inc., is remarkably inexpensive (less than a penny a call) and highly effective. A more detailed description of this service is provided in the attached Declaration of Ms. Mervat Olds (Exhibit A), former Product Manager for XO Communications. *See also* Call Compliance, 2005 Online Regulatory Guide, *at* http://www.cci.regulatoryguide.com/myeln/cci.asp.

Free markets have an uncanny way of enabling businesses to meet the demands of consumers. The market for telephone service features is proving no different when it comes to meeting consumer demands not to be called by telemarketers. TeleBlock® and other compliance services have supplied a cost-effective, straightforward tool for telemarketers to comply with the Commission's Rules, the Federal Trade Commission's Rules, and the various state rules governing telephone solicitations. Hence, the petitioners' claims that compliance with a multistate telemarketing regime is somehow burdensome or expensive are unsubstantiated and absurd.

3. Indiana has a stake in successful compliance by telemarketers and works with them to achieve just that

Indiana realizes that the key to enforcing a successful do-not-call program is not to wait for telemarketers to violate the law and then levy steep fines or each errant call, but is instead to work with telemarketers and provide them with helpful tools in order to prevent violations. The privacy of 1.6 million Indiana citizens that benefit from Indiana's do-not-call is not restored with fines against violators. The law helps those citizens only if there is effective compliance.

Since the program's inception, Indiana has taken several steps to assist telemarketers with compliance. For example, while Indiana's do-not-call statute was signed into law in May, 2001, it did not become enforceable until January 1, 2002. The legislature provided this delay in order to provide telemarketers with enough time to learn about the law and to plan their compliance efforts. In the months leading up to enforceability, the Telephone Privacy Division of the Office of the Indiana Attorney General sent letters to over 1000 businesses and telemarketers across the country advising them when the law would become enforceable and inviting them to contact the Division with any questions concerning compliance. The office even offered to provide telemarketers with computer technicians if needed to install software to download and operate the state's do-not-call list.

The Division continues to promote compliance in the following ways (among others):

- The list is available for purchase and downloading over the Internet at any time;
- Technical support is available six days a week for assistance with downloading the list;
- The list is available in a variety of data formats;
- Small businesses (and others) may search the database (via the Internet) for particular phone numbers free of charge;
- Rather than immediately subjecting them to court enforcement or heavy fines, the Division sends alleged violators a "first letter" inviting them to explain the situation and offering to assist them with compliance;
- Repeat violators are offered an Assurance of Voluntary Compliance ("AVC") to settle complaints and ensure compliance, often for a fraction of the statutory maximum penalty ($10,000 for the first violation, $25,000 for each subsequent violation).

The result of all these efforts, is that telemarketers have been able to comply with Indiana's law notwithstanding the advent of multi-jurisdictional regulation in this area over the past few years. Just this spring, Indiana had to file its first (and so far only) enforcement action in court. This is a regulatory system that works, not a system rife with hapless and confused but otherwise innocent violators.

CONCLUSION

For the foregoing reasons, the Commission should deny the ACS Coalition's Joint Petition For Declaratory Ruling and rule that states are in no way preempted from enforcing do-not-call or other telemarketing laws where offending telephone calls cross state lines. The Commission should expressly declare that its do-not-call rule and registry do not preempt any similar state laws or registries.

Respectfully submitted,

STEVE CARTER
Attorney General of Indiana

By: /s/Thomas M. Fisher ___
Solicitor General

Counsel for the State of Indiana

Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
(317) 232-6255
tfisher@atg.state.in.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State of Indiana's Comments in Opposition to Alliance Contact Services, *et al.*'s Joint Petition for Declaratory Ruling was filed electronically and served upon all counsel of record listed below, by email and United States Mail, first-class, postage prepaid, this 29th day of July, 2005:

Mark A. Grannis
Timothy J. Simeone
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street NW, Suite 1200
Washington, DC 20036

Counsel for Alliance Contact Services, et al.

/s/ Thomas M. Fisher
Solicitor General

Office of Indiana Attorney General
Indiana Government Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
(317) 232-6255

Exhibit A

DECLARATION OF MERVAT F. OLDS

I, MERVAT F. OLDS, declare as follows:

1. My name is Mervat F. Olds. Until earlier this year, I served as Product Manager for XO Communications in Reston, Virginia. In that capacity, I gained much of the personal knowledge and expertise regarding "Do-Not-Call" compliance systems that is reflected in this Declaration.

2. I obtained a Bachelor's degree in Purchasing and Logistics Management from Arizona State University in 1992. After obtaining this degree, I embarked on a twelve-year-long career in the telecommunications industry, principally in marketing long-distance products, services, and features to commercial clients of major telecommunications companies. Over those twelve years, I was employed by Cable & Wireless (1993-1996), Electric Lightwave (1996-1999), ICG Communications (1999-2000), and, ultimately, XO Communications, where I served as Product Manager from 2001 to 2005.

3. In my capacity as Product Manager at XO, I was responsible for XO's entire long-distance product line (including, for example, toll-free calling, international toll-free service, "1+" conference calling, "1+" outbound calling, and calling cards), and for building and maintaining relationships with XO's clients. We accomplished this by, among other things, ensuring the availability of products and services most important to our client base.

4. By Summer 2003, a number of XO's large-scale long-distance customers, who were either in or involved with the business of telemarketing, had expressed the need or desire for a feature that would ensure their efficient and low-cost compliance with the "Do Not Call" laws that had been enacted by several states and by the Federal government. I quickly

determined that XO would have to either create or obtain such a feature in order to maintain our good will, and ultimately our accounts, with these large long-distance customers.

5. At that time, I met with Dean Garfinkel, the Chairman of Call Compliance, Inc. (CCI), based in Glen Cove, New York. Mr. Garfinkel and CCI had developed, patented (U.S. Patent No. 6,330,317), and marketed the TeleBlock® screening service, an add-on feature for telecommunications providers like XO to provide to its telemarketing customers to ensure compliance with the Federal and various state Do-Not-Call laws. After meeting with Mr. Garfinkel and others at CCI, and learning about TeleBlock® and its functionality, I was convinced that XO should procure and provide for its clients the TeleBlock® compliance system. XO, acting upon my recommendation, did just that: By October 2003, XO had rolled out TeleBlock® as a feature of several of its major product lines.

6. TeleBlock®, when purchased as part of a package of XO's telecommunications services, provides telemarketers with a low-cost, convenient, and highly effective way of ensuring compliance with Federal and state Do-Not-Call laws.

a. The cost of TeleBlock®, to telemarketers who subscribed to a package of XO telecommunications services, was exceedingly minimal – $0.01 per call. In other words, for every one hundred calls placed by a telemarketer using XO's telecommunications services, it would cost the telemarketer one dollar for the TeleBlock® service. Further, it is my understanding that, because of TeleBlock®'s minimal cost, some telecommunications providers are bundling that feature into their telecommunications packages in a way that makes that feature essentially free of cost to the telemarketer.

b. As for TeleBlock®'s convenience, it is automatic and virtually invisible to the telemarketer and its employees. Once a telemarketer subscribes to TeleBlock®, their telecommunications provider (such as XO) automatically routes all outgoing calls through the TeleBlock® filter. Thus, all a telemarketer need do is dial a particular consumer's number, and before that call is connected, it is screened by CCI. If the consumer's number being dialed appears on the list of restricted numbers associated with that subscriber's account, the telemarketing caller gets a recorded message indicating that the call has been blocked. Otherwise, the call is completed as it normally would be.

c. TeleBlock®'s effectiveness was unquestionable. CCI's staff monitors all Do-Not-Call legislation and rules, as well as the Do-Not-Call registries, and maintains a separate database of numbers to be blocked for each telemarketer subscriber. The Federal and state databases are reviewed by CCI, and the customer's account updated, once a month. Moreover, TeleBlock® allows telemarketers to take account of exceptions, exemptions, or other differences that are not universally available under all Do-Not-Call laws by adding or deleting numbers (or categories of numbers) from that telemarketer subscriber's individual account. Not a single XO customer using the TeleBlock® feature was fined for a Do-Not-Call violation while I was employed by XO, and that includes several telemarketing customers of XO who were regularly fined for such violations before they implemented the TeleBlock® service.

7. TeleBlock® is, to my knowledge, universally available to all telephone carriers – and it is currently offered by other major providers (in addition to XO) such as MCI, Qwest, Paetec Communications, and VarTec Solutions. It can service large clients like telemarketing firms, smaller businesses, and even businesses that use internet-based telephone networks.

8. TeleBlock®, of course, is not the only product available for Do-Not-Call compliance. Gryphon Networks (www.gryphonnetworks.com) offers a system that, among other things, automatically accounts for variations in Do-Not-Call laws, such as specific curfew times

and existing-business-relationship exemptions. Other products for Do-Not-Call compliance are available from DNCSolution (www3.dncsolution.com), StrikeIron (www.strikeiron.com), Anchor Computer (www.anchorcomputer.com), and Red Clay Media (www.redclaymedia.com), among others. Nor is TeleBlock® necessarily the least expensive. A large telemarketer utilizing a "list-scrubbing" compliance tool could expect to pay less than $.002 per call to check its phone lists against multiple Do-Not-Call registries. I would therefore expect Do-Not-Call compliance systems to continue to improve, and become even less expensive than they are currently, thanks to the presence of this wide competition. Each of these products is explained in greater detail at these companies' websites.

9. Telemarketers have generously praised many of these systems. The CCI website contains testimonials from TeleBlock® customers stressing how easy that product makes compliance with Do-Not-Call laws: "The service is working beautifully. I have yet to run across anyone that was on a DNC list;" TeleBlock® "is very simple to use and the customer service is excellent;" "TeleBlock® seamlessly integrated with all of our different types of dialing equipment;" "easy to administer. I have zero mistakes." Customers of Gryphon Networks have expressed similarly effusive praise, according to that company's website.

10. In my opinion, based on my experience in the telecommunications industry generally, and with Do-Not-Call compliance issues and products in particular, these compliance products offer telemarketers a wide variety of extremely simple, inexpensive, and highly effective options for complying, simultaneously, with the Federal Do-Not-Call law and the various state Do-Not-Call laws, without working any significant burden (whether cost, complexity, or effectiveness) on those telemarketers.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 25, 2005.

Mervat F. Olds